A **FATHUL BARI MAT JAHYA & ANOR**

v.

MAJLIS AGAMA ISLAM NEGERI SEMBILAN & ORS

B FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ZULKEFLI MAKINUDIN CJ (MALAYA)
ABDULL HAMID EMBONG FCJ
SURIYADI HALIM OMAR FCJ
C HASAN LAH FCJ
[PETITION NO: 3/2010]
30 MAY 2012
[2012] CLJ JT(2)

D ***CONSTITUTIONAL LAW:*** *Federal and State law - Islamic law Enactment - Constitutionality - Section 53 Syariah Criminal (Negeri Sembilan) Enactment 1992 - Requirement of tauliah as prerequisite to teach religion of Islam - Enactment of section - Whether in breach of the Federal Constitution - Heads or fields of legislation in legislative lists of*
E *Federal Constitution - Whether to be liberally interpreted - Whether to be given widest significance - Federal Constitution, art. 74(2) & Item 1, State List, Ninth Schedule*

CONSTITUTIONAL LAW: *Jurisdiction - Syariah Court - Syariah Court of Negeri Sembilan - Offence of teaching religion of Islam without*
F *a tauliah - Section 53(1) Syariah Criminal (Negeri Sembilan) Enactment 1992 - Whether constituting an order of Ulil Amri - Whether properly a matter within criminal jurisdiction of Syariah Court - Federal Constitution, art. 74(2) & Item 1, State List, Ninth Schedule*

G ***ISLAMIC LAW:*** *Precepts of Islam - Teaching of religion - Requirement of tauliah - Teaching of religion of Islam without tauliah - Whether an offence against precepts of Islam - Whether requirement an order of Ulil Amri - Whether to prevent deviant teachings and division in society - Whether binding on Muslims - Federal Constitution, art. 74(2) & Item*
H *1, State List, Ninth Schedule - Syariah Criminal (Negeri Sembilan) Enactment 1992, s. 53(1) - Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, s. 118*

WORDS & PHRASES: *"Precepts of Islam" - Item 1, State List,*
I *Ninth Schedule of the Federal Constitution - Whether derived from the Qur'an - Purport and meaning*

The first petitioner was charged in the Syariah Subordinate Court, Negeri Sembilan for an offence under s. 53(1) of the Syariah Criminal (Negeri Sembilan) Enactment 1992 ('the Enactment') for conducting a religious talk without a *tauliah*, while the second petitioner was charged with abetting the offence. The petitioners sought to challenge the validity and constitutionality of the said s. 53 and, having been granted leave there for, argued before the learned justices of the Federal Court herein that the section was invalid for breaching art. 74(2) and Item 1, State List, Ninth Schedule of the Federal Constitution ('the Constitution'), and secondly that since s. 53 did not fall within the realm of Item 1, the Syariah Court of Negeri Sembilan therefore had no jurisdiction to try an offence under the section. It was not in dispute that art. 74(2) read with Item 1 of the State List, Ninth Schedule of the Constitution conferred on the State Legislature the power to make laws with respect to the "creation and punishment of offences by persons professing the religion of Islam against *precepts of that religion*". The petitioners however contended that teaching the religion of Islam without a *tauliah* is not an offence against the pillars or precepts of Islam, and that the State Legislature therefore had exceeded its legislative authority when it enacted s. 53 and made it such an offence. The respondents *inter alia* retorted that the incident whereby the Holy Prophet (peace be upon him) had examined Muaz bin Jabal before accrediting him with the authority to teach the religion of Islam to society implied that a *tauliah* was indeed required before anyone could be allowed to preach the religion. It was further argued that s. 53 of the Enactment was effectually an order of the *Ulil Amri* (the Government), and since it was not contrary to the Al-Quran or As-Sunnah, every Muslim was bound to abide by the order. Upon the arguments thus regurgitated by the parties, it was incumbent on the learned judges to delve into the issue of whether the requirement of a *tauliah* for the teaching of the religion of Islam did fall within the precepts of Islam, and if so, whether the first applicant committed an offence against the precepts of Islam and attracted thereby the jurisdiction of the Syariah Court.

Held (dismissing petition with no order as to costs)
Per Arifin Zakaria CJ delivering the judgment of the court:

(1) There is a clear authority premised on the *Hadith* of the Holy Prophet (peace be upon him) concerning the sending of Muaz bin Jabal to Yemen that some sort of verification is necessary before a preacher is allowed to teach the religion to others.

In any event, all the experts share the common view that the teaching of Islam needs to be regulated to prevent deviant teachings. The authority must first verify whether a preacher is sufficiently qualified to teach or preach a religion and this must be done before the preacher goes around preaching. Clearly, the requirement of a *tauliah* is just a mechanism to achieve this purpose. (para 19)

(2) The term "precepts of Islam" which covers the three main domains of *aqidah, syariah* and *akhlak* (creed, law and morality) must be accorded a wide and liberal meaning. This is in line with the authorities on the interpretation of heads or fields of the legislation as appearing in the legislative lists of the Federal Constitution. Each entry in each legislative list must therefore be given its widest significance and its scope cannot be curtailed save to the extent necessary to give effect to other legislative entries. (*Sulaiman bin Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) & Other Applications*, foll), *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors and Other Appeals*, foll) (paras 12 & 20)

(3) The requirement of a *tauliah* for the purpose of protecting the public interest falls within the concept of *Siyasah Syari'yah*. Such order or direction is made not merely to prevent deviant teachings, but also to maintain order and prevent division in the community. Clearly, no one could suggest that the requirement of a *tauliah* as stipulated in s. 53 of the Enactment is a *maksiat* (vice). On the contrary, it is necessary in this day and age for the authority to regulate the teachings or preaching of the religion in order to control, if not eliminate, deviant teachings. The integrity of the religion needs to be safeguarded at all cost. That is what s. 53 purports to do. This being the case, the contention that the Syariah Court in Negeri Sembilan does not have the jurisdiction to try an offence under s. 53 of the Enactment is devoid of any merit. (paras 26 & 27)

(4) The purpose of s. 53 of the Enactment is clear in that it seeks to protect the integrity of the *aqidah, syariah* and *akhlak* which constitutes the precepts of Islam. The requirement is necessary to ensure that only a person who is qualified to teach the religion is allowed to do so. This is a measure to stop the spread of deviant teachings among Muslims which is an

offence under s. 52 of the Enactment. It is commonly accepted that deviant teachings among Muslims is an offence against the precepts of Islam. It follows that there is merit in the respondent's contention that, by necessary implication, the teaching of Islam without a *tauliah* could be construed as an offence against the precepts of Islam. Likewise, it follows that the State Legislative Assembly of Negeri Sembilan had acted within its legislative power in enacting s. 53 of the Enactment. (para 24)

(5) Section 53 of the Enactment is enacted pursuant to s. 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965, a federal legislation conferring criminal jurisdiction to the Syariah Courts in respect of offences against the precepts of the religion of Islam by persons professing that religion. It follows further therefore that the Syariah Court of Negeri Sembilan is conferred with the necessary jurisdiction to try such an offence. (para 28)

(6) This court is in complete agreement with the view of the Mufti of Negeri Sembilan that s. 53 of the Enactment is an order or direction made by *Ulil Amri* or the Government and for as long as the order or direction is not contrary to Al-Quran or As-sunnah and is not an order or direction to engage in *maksiat*, it is obligatory upon Muslims to abide by such order or direction. Obedience to such order or direction constitutes a precept of Islam. (para 25)

Bahasa Malaysia *Translation Of Headnotes*

Pempetisyen pertama telah dituduh di Mahkamah Rendah Syariah, Negeri Sembilan dengan kesalahan di bawah s. 53(1) Enakmen Jenayah Syariah (Negeri Sembilan) 1992 ('Enakmen') kerana mengadakan ceramah agama tanpa tauliah, sementara pempetisyen kedua dituduh bersubahat dengan pempetisyen pertama. Kedua-dua pempetisyen berhasrat untuk mencabar kesahan dan keperlembagaan s. 53 tersebut dan, setelah memperoleh kebenaran untuknya, berhujah di hadapan yang arif hakim-hakim Mahkamah Persekutuan di sini bahawa s. 53 adalah tak sah kerana melanggar peruntukan fasal 74(2) dan Perkara 1, Senarai Negeri, Jadual Kesembilan, Perlembagaan Persekutuan ('Perlembagaan'), dan keduanya, oleh kerana s. 53 tidak termasuk ke dalam skop Perkara 1, maka Mahkamah Syariah Negeri Sembilan adalah tidak berbidangkuasa untuk mendengar dan memutuskan kesalahan di

bawah seksyen tersebut. Tidak dinafikan bahawa fasal 74(2), dibaca bersama Perkara 1, Senarai Negeri, Jadual Kesembilan Perlembagaan, memberi kuasa kepada Badan Perundangan Negeri untuk membuat undang-undang berhubung dengan "pewujudan dan penghukuman kesalahan yang dilakukan oleh orang-orang yang menganut agama Islam *terhadap perintah agama itu*". Pempetisyen-pempetisyen bagaimanapun berhujah bahawa mengajar agama Islam tanpa tauliah bukanlah satu kesalahan terhadap perintah atau ajaran agama Islam, dan bahawa Badan Perundangan Negeri dengan itu telah melangkaui kuasa perundangannya apabila menggubal s. 53 dan menjadikan perbuatan tersebut suatu kesalahan. Responden-responden menghujah balas antara lain bahawa peristiwa di mana Nabi (selawat dan salam ke atasnya) telah menyoal-selidik Muaz bin Jabal sebelum mengizinkannya mengajar agama Islam kepada masyarakat secara tidak langsung menunjukkan bahawa suatu tauliah adalah diperlukan sebelum seseorang boleh dibenarkan untuk mengajar agama. Dihujahkan selanjutnya bahawa s. 53 secara berkesannya adalah suatu perintah *Ulil Amri*, dan oleh kerana ianya tidak bercanggah dengan Al-Qur'an ataupun As-Sunnah, maka setiap Muslim wajib mematuhinya. Berdasarkan kepada hujah-hujah yang dibangkitkan oleh pihak-pihak, menjadi kewajipan kepada yang arif hakim-hakim untuk mentelaah persoalan sama ada keperluan mendapatkan tauliah untuk mengajar agama Islam termasuk ke dalam perintah agama Islam, dan jika begitu sama ada pemohon pertama telah melakukan kesalahan terhadap perintah tersebut sekaligus menjadikannya satu kesalahan yang berada di bawah bidangkuasa Mahkamah Syariah.

Diputuskan (menolak petisyen tanpa perintah mengenai kos) Oleh Arifin Zakaria KHN menyampaikan penghakiman mahkamah:

(1) Terdapat autoriti jelas berasaskan Hadith Nabi (selawat dan salam ke atasnya) berhubung dengan penghantaran Muaz bin Jabal ke Yaman bahawa suatu bentuk pentauliahan adalah perlu sebelum seseorang boleh dibenarkan mengajar agama kepada orang lain. Apapun, ulamak-ulamak sependapat bahawa pengajaran agama Islam perlu dikawalselia bagi menghalang ajaran sesat. Pihak berkuasa harus terlebih dahulu menentukan sama ada seseorang pengajar itu berkelayakan secukupnya

untuk mengajar dan mengembangkan agama dan ini harus dibuat sebelum si pengajar keluar ke dalam masyarakat untuk mengajar. Adalah jelas bahawa syarat mengenai tauliah hanyalah mekanisma untuk mencapai maksud ini. A

(2) Terma "perintah agama Islam" yang merangkumi persoalan pokok aqidah, syariah dan akhlak harus diberikan pentafsiran yang liberal. Ini selaras dengan autoriti-autoriti berkaitan dengan tajuk-tajuk atau bidang-bidang perundangan seperti yang terdapat di dalam senarai-senarai perundangan Perlembagaan Persekutuan. Oleh itu, setiap butiran dalam setiap senarai perundangan hendaklah diberikan kepentingannya yang seluas mungkin, dan skopnya tidak harus diperkecilkan kecuali setakat yang perlu untuk memberi kesan kepada butiran-butiran perundangan lain. (*Sulaiman bin Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, Intervener) & Other Applications* (diikuti), *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors and Other Appeals*, (diikuti)). B C D

(3) Keperluan tauliah bagi maksud melindungi kepentingan awam adalah termasuk di bawah konsep *Siyasah Syari'yah*. Perintah atau arahan sedemikian bukan hanya dibuat bagi membendung ajaran sesat, tetapi juga untuk menjaga keamanan awam dan menghalang perpecahan dalam masyarakat. Jelasnya, tiada seorang pun boleh mendakwa bahawa keperluan tauliah seperti yang ditetapkan oleh s. 53 Enakmen adalah satu maksiat. Sebaliknya, dalam keadaan sekarang, adalah perlu untuk pihak berkuasa menyelia penyebaran dan pengajaran agama Islam bagi mengawal, jikapun tidak membanteras, ajaran sesat. Inilah yang hendak dibuat oleh s. 53, dan berdasarkan kedudukan ini, hujah bahawa Mahkamah Syariah di Negeri Sembilan tidak berbidangkuasa untuk mendengar kesalahan di bawah s. 53 Enakmen adalah tidak bermerit. E F G

(4) Tujuan s. 53 Enakmen adalah jelas iaitu untuk melindungi keunggulan aqidah, syariah dan akhlak yang merupakan ajaran agama Islam. Seksyen 53 adalah perlu untuk mempastikan bahawa hanya mereka yang layak sahaja dibenar mengajar agama Islam. Ini adalah langkah untuk membendung penyebaran ajaran sesat di kalangan orang Islam yang merupakan satu kesalahan di bawah s. 52 Enakmen. Sudah diterima ramai bahawa menyebar ajaran sesat di kalangan orang Islam adalah suatu kesalahan terhadap ajaran Islam. Ianya mengikut bahawa terdapat merit pada hujah responden- H I

responden bahawa, secara implikasi, mengajar agama Islam tanpa tauliah boleh ditafsir sebagai satu kesalahan terhadap ajaran Islam. Ianya juga mengikut bahawa Dewan Undangan Negeri Sembilan bertindak dalam kuasa perundangannya apabila menggubal s. 53 Enakmen.

(5) Seksyen 53 Enakmen digubal di bawah s. 2 Akta Mahkamah Syariah (Bidangkuasa Jenayah) 1965, satu undang-undang persekutuan yang memberi bidangkuasa jenayah kepada Mahkamah Syariah berhubung kesalahan-kesalahan terhadap ajaran agama Islam oleh penganut-penganut agama tersebut. Ianya dengan itu mengikut selanjutnya bahawa Mahkamah Syariah Negeri Sembilan adalah berbidangkuasa untuk mendengar kes yang sedemikian.

(6) Mahkamah bersetuju sepenuhnya dengan pandangan Mufti Negeri Sembilan bahawa s. 53 Enakmen adalah merupakan perintah atau arahan yang dibuat oleh *Ulil Amri* atau Kerajaan dan selagi perintah atau arahan tersebut tidak bercanggahan dengan Al-Qur'an atau As-Sunnah dan bukan merupakan perintah atau arahan untuk berkecimpung dalam maksiat, maka adalah wajib untuk orang-orang Islam mematuhi perintah atau arahan tersebut. Pematuhan kepada perintah atau arahan sedemikian adalah sebahagian dari ajaran Islam.

Case(s) referred to:

Ah Thian v. Government of Malaysia [1976] 1 LNS 3 FC ***(refd)***

Diamond Sugar Mills v. State of UP AIR (48) 1961 Supreme Court 652 ***(refd)***

Dorairajan v. State of Madras (FB) AIR (38) 1951 Madras 120 [CN 14] ***(refd)***

Harakchand Ratanchand Banthia v. Union of India AIR 1970 Supreme Court 1453 ***(refd)***

In re CP Motor Spirit Act AIR 1939 Federal Court 1 ***(refd)***

Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors and Other Appeals [1997] 4 CLJ 253 CA ***(foll)***

Mamat Daud & Ors v. The Government of Malaysia [1986] 2 CLJ 118; [1986] CLJ (Rep) 190 SC ***(refd)***

Subramaniam v. Muthuswami AIR 1941 FC 47 ***(refd)***

Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases [2009] 2 CLJ 54 FC ***(foll)***

Punjab D Industries v. IT Commr AIR (52) 1965 Supreme Court 1862 ***(refd)***

Union of India v. Shri Harbhajan Singh Dhillon [1971] 2 SCC 779 ***(refd)***

United Provinces v. Mt. Atiqa Begum and Other AIR 1941 Federal Court 16 ***(refd)***

Legislation referred to:

Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, s. 118
Federal Constitution, arts. 4(4), 74(2), 128(1)(a)
Syariah Courts (Criminal Jurisdiction) Act 1965, s. 2
Syariah Criminal (Negeri Sembilan) Enactment 1992, s. 53(1)

For the petitioners - Kamarul Hisham Kamaruddin (Hasnal Rezua Merican & Lim Kon Keen with him); M/s The Chambers of Kamarul Hisham & Hasnal Rezua
For the 1st respondent - Hanif Hassan; M/s Hanif Hassan & Co
For the 2nd respondent (State Government of Negeri Sembilan) - Dato' Ishak Sahari; State Legal Advisor of Negeri Sembilan
For the 3rd respondent (Government of Malaysia) - Datin Hjh Azizah Hj Nawawi (Suzana Atan & Arik Sanusi Yeop Johari with her) SFC's

Reported by Wan Sharif Ahmad

JUDGMENT

Arifin Zakaria CJ:

[1] This petition was filed pursuant to art. 4(4) of the Federal Constitution for which leave was granted by this court on 5 July 2010. The petitioners herein seek the following reliefs:

(i) for a declaration that section 53(1) of the Syariah Criminal Enactment (Negeri Sembilan) 1992 (Enactment No. 4 Year 1992) as amended by section 3 of the Syariah Criminal Enactment (Negeri Sembilan) (Amendment) 2004 (Enactment 3 Year 2004) is null and void as being contrary to the Federal Constitution;

(ii) for a declaration that the Syariah Court for Negeri Sembilan does not have jurisdiction to try any offence under section 53(1) of the Syariah Criminal Enactment (Negeri Sembilan) 1992 (Enactment No. 4 Year 1992) as amended by section 3 of Syariah Criminal Enactment (Negeri Sembilan) (Amendment) 2004 (Enactment 3 Year 2004); and

(iii) for any other declarations or consequential orders that this Honourable Court deems fit and just to be given.

[2] The facts giving rise to this petition are briefly as follows. The 1st petitioner was arrested by the enforcement officers of Jabatan Hal Ehwal Agama Islam Negeri Sembilan on 28 February 2010 for conducting a religious talk without a *tauliah* in the District

of Kuala Pilah, Negeri Sembilan. This is an offence under s. 53(1) of the Syariah Criminal Enactment (Negeri Sembilan) 1992 ("the Enactment") and he was accordingly charged for the said offence at the Syariah Subordinate Court of Negeri Sembilan. The 2nd petitioner was charged for aiding and abetting the 1st petitioner. The charges are still pending before the said court.

[3] The petitioners are challenging the constitutionality of s. 53(1) of the Enactment on the ground that the State Legislature has exceeded its legislative authority in enacting the said section. They further contend that the Syariah Court lacks jurisdiction to try the offence under the said section. In support, the petitioners cited the case of *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112, where Suffian LP at p. 113 observed:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.
>
> Under our Constitution written law may be invalid on one of these grounds:
>
> (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74; or
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> (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or
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> (3) in the case of State written law, because it is inconsistent with Federal law, article 75.
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> The court has power to declare any Federal or State law invalid on any of the above three grounds.
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> The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.
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> But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

[4] We fully agree with the above observation by Suffian LP. Let us now consider what s. 53(1) of the Enactment provides. It reads as follows:

> 53. Teaching of religion without *tauliah*
>
> (1) Any person who engages in the teaching of religion without a *tauliah* from the Tauliah Committee under subsection 118(3) of the Administration Enactment, except to members of his family at his place of residence only, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding three thousand ringgit or imprisonment for a term not exceeding two years or both.

[5] Section 118 of the Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 provides as follows:

> **118. Tauliah Committee**
>
> (1) The Majlis shall appoint a committee to be known as the Tauliah Committee, which shall consist of –
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> (a) the Mufti as Chairman; and
>
> (b) not less than three and not more than seven persons with the appropriate experience, knowledge and expertise.
>
> (2) The Majlis shall be responsible for implementing the decisions of the Committee.
>
> (3) The Tauliah Committee shall have power to grant a *tauliah* for the purpose of the teaching of the religion of Islam or any aspect of the religion of Islam and to withdraw such *tauliah*.

[6] The petitioners contend that s. 53(1) of the Enactment is invalid on the ground that it breaches art. 74(2) and Item 1, State List, Ninth Schedule of the Federal Constitution wherein the State Legislature is conferred with the power to make laws only with respect to the "creation and punishment of offences by persons professing the religion of Islam against precepts of that religion". The petitioners contend that the stipulation for which a *tauliah* is required before any person engages in the teaching of religion is not an offence against the precepts of Islam as provided in Item 1, State List, Ninth Schedule of the Federal Constitution. They maintain that there is no such offence in Islam. On that

premise, s. 53(1) of the Enactment falls outside the scope of the relevant provision. Hence it is invalid. They referred us to *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors and Other Appeals* [1997] 4 CLJ 253 where Gopal Sri Ram JCA (as he then was) stated at p. 271:

> Generally speaking, if a particular subject in respect of which a law is enacted is not one of those enumerated in the enabling constitutional provision, the enacted law is *ultra vires* and therefore void: *Mamat bin Daud & Ors v. Government of Malaysia* [1988] 1 MLJ 119. Proceedings to have a law invalidated on this ground – that is to say, the lack of legislative jurisdiction – must be brought in accordance with the terms of art. 4(4) read with art. 128 of the Federal Constitution.

[7] Section 53(1) of the Enactment is enacted pursuant to art. 74(2) read together with Item 1, State List, Ninth Schedule of the Federal Constitution. This is clear from the Preamble to the Enactment. Article 74(2) of the Federal Constitution reads:

> Subject matter of federal and State laws.
>
> 74 (1) ...
>
> (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

[8] Item 1, State List, Ninth Schedule of the Federal Constitution reads:

> LIST II – State List
>
> 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts,

charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, **creation and punishment of offences by persons professing the religion of Islam against precepts of that religion,** except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom. (emphasis added).

[9] The petition herein is made under art. 128(1)(a) of the Federal Constitution which provides:

Jurisdiction of Federal Court

128(1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction -

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

(b) ...

[10] The article confers upon this court the exclusive power to determine the issue or matter in the exercise of its original jurisdiction (see *Mamat Daud & Ors v. The Government of Malaysia* [1986] 2 CLJ 118; [1986] CLJ (Rep) 190). Perhaps, I need to mention here that the decision of this court on the issue is therefore binding on all courts in the country including the Syariah Courts.

Precepts Of Islam

[11] The critical issue in this petition turns on the question of whether the requirement of a *tauliah* for the teaching of the religion of Islam falls within the precepts of Islam, without which, any person who teaches Islam is committing an offence against the precepts of Islam. The petitioners submit it is not.

[12] Before we delve into that issue, it is necessary for us to firstly consider what is meant by the term "precepts". The word "precepts" is not defined in the Federal Constitution. It came for consideration of this court in *Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases* [2009] 2 CLJ 54. In that case, the court was asked to consider the issue of whether the non-compliance of a fatwa issued by the *Fatwa* Committee is an offence against the precepts of Islam. Even though the principal issue in that case is not the same as here, the observation of the court as to what is meant by "precepts" is relevant to the present case. Having considered the expert opinions tendered in that case, Abdul Hamid Mohamed CJ in delivering the judgment of the court held:

> There is no definition of the word "precepts" in the Federal Constitution. The Malay translation of the Constitution uses the word 'perintah'. The Istilah Undang-Undang (3rd Ed), Sweet & Maxwell Asia uses the word 'arahan' for 'precepts'. The Kamus Inggeris Melayu Dewan, uses the word 'ajaran'. According to Siri Glosari Undang-Undang of the Dewan Bahasa dan Pustaka 'precepts' means 'perintah', ie 'Suruhan dan Larangan melakukan sesuatu, contohnya dalam agama.' According to the Oxford English Dictionary the word 'precept' means 'a general command or injunction; an instruction, direction or rule for action and conduct; esp an injunction as to moral conduct; a maxim. Most commonly applied to divine commands ...'. In my view, the meanings of the word "precept" quoted above point to the same thing as described in greater detail in the Oxford English Dictionary. I accept them all.
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> ...
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> It can be seen that all the three expert witnesses agree that:
>
> (a) precepts of Islam cover three main domains ie creed or belief *('aqidah')*, law ('shari'ah')and ethics or morality ('akhlak');
>
> (b) precepts of Islam are derived from the Qur'an and Sunnah.

[13] We completely agree with the above view. In the present case, both parties have also filed their respective expert opinions by way of affidavits. For the petitioners, we have Tan Sri Dato' Seri Dr. Haji Harussani bin Haji Zakaria, (the Mufti of Perak) and Professor Madya Dato' Alim Panglima Haji Mat Jahya bin Haji Hussin, (the former Mufti of Perlis) who is also the father of the 1st petitioner.

[14] Whereas, for the respondents, we have Tan Sri Sheikh Ghazali bin Haji Abdul Rahman, the Syariah Legal Adviser at the Attorney General's Chambers; Dato' Hj. Mohd Yusof bin Hj. Ahmad, (the Mufti of Negeri Sembilan) and Ustaz Muhammad Fuad bin Kamaludin, the Chairman for *Aqidah* (Belief), Islamic Religious Council of Negeri Sembilan. We have no doubt that they are all worthy expert witnesses on Islam. Though the former Mufti of Perlis is giving his expert opinion in support of his own son, the 1st petitioner, this court found that his opinion is purely academic and far from being bias in favour of the 1st petitioner.

[15] Briefly, this is what they said. The former Mufti of Perlis holds the view that *tauliah* does not fall within the precepts of Islam. Instead, what is important to consider is the level of knowledge of that person and the correctness of the contents of his teachings according to Al-Quran and As-Sunnah. He then concluded that the offence of teaching without *tauliah* is merely an administrative offence in nature, rather than an offence against the precepts of Islam.

[16] The Mufti of Perak shares the same sentiment that is, teaching the religion of Islam without a *tauliah* is not an offence against the pillars of Islam but rather an offence under the administration of Islamic law. However, he admitted that *tauliah* is an important mechanism to keep the teaching of Islam in line with Al-Quran and As-Sunnah.

[17] The Mufti of Negeri Sembilan and Ustaz Muhammad Fuad bin Kamaludin hold the view that *tauliah* is a prerequisite before one could teach the religion of Islam, based on the Hadith of the Holy Prophet (peace be upon him). It was narrated in that Hadith that before the Holy Prophet sent his companion Muaz bin Jabal to Yemen to be his representative, including to teach the religion of Islam to the Yemenites, the Holy Prophet (peace be upon him) had asked several questions to Muaz bin Jabal as to how he would decide on a particular case referred to him. This incident shows that the Holy Prophet (peace be upon him) himself had examined his companion before accrediting him with the authority to teach the religion of Islam to society. Though the word *tauliah* is not used, but in effect, it is a *tauliah* in every sense of the word.

[18] On the other hand, the Mufti of Perak and the former Mufti of Perlis stated that that there is no authority from Al-Quran or As-Sunnah requiring a *tauliah*. Regarding the Hadith of the Holy Prophet (peace be upon him) on the mission sending out Muaz bin Jabal to Yemen, the Mufti of Perak said, the Holy Prophet (peace be upon him) did not view it as a *tauliah* when he chose Muaz bin Jabal but instead had considered the level of his knowledge and the accuracy of his teachings. That he said cannot be equated with *tauliah*. They maintained that the *tauliah* system that we practise today is different in that a preacher is guilty if he teaches without a *tauliah*, without considering the contents of the preaching.

[19] From the above, we are of the view that there is a clear authority premised on the Hadith of the Holy Prophet (peace be upon him) concerning the sending of Muaz bin Jabal to Yemen that some sort of verification is necessary before a preacher is allowed to teach the religion to others. In any event, all the experts share the common view that the teaching of Islam needs to be regulated to prevent deviant teachings. How else can the authority do this without first verifying whether a preacher is sufficiently qualified to teach or preach the religion? This must be done before the preacher goes around preaching and not after. As we see it, the requirement of *tauliah* is just a mechanism to achieve this purpose.

[20] Further, we are of the view that the term precepts of Islam must be accorded a wide and liberal meaning. This is in line with the authorities on the interpretation of the heads or fields of the legislation as appearing in the legislative lists of the Federal Constitution. As was observed by Gopal Sri Ram JCA (as he then was) in the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor (supra)* as follows:

> It is a well settled principle of constitutional interpretation that every entry in each Legislative List must be given its widest significance and that its scope cannot be curtailed save to the extent necessary to give effect to other legislative entries: *State of Bombay v. Narottamdas Jethabhai* AIR 1951 SC 69.
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> In *JC Waghmare & Ors v. State of Maharashtra* AIR 1978 Bom 119 at p 137, Tulzapurkar Ag CJ, when delivering the judgment of a strongly constituted Full Bench of the Bombay High Court, after a review of the leading authorities upon the subject, summarized the applicable principles as follows:

> From the above discussion, the following general principles would be clearly deducible: (a) entries in the three Lists are merely legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate; (b) allocation of subjects in the Lists is not by way of scientific or logical definition but is a mere enumeration of broad and comprehensive categories; dictionary meaning of the words used, though helpful, is not decisive; (c) entries should be interpreted broadly and liberally, widest amplitude being given to the words employed, because few words of an entry are intended to confer vast and plenary powers; (d) entries being heads of legislation, none of the items in the Lists is to be read in a narrow and restricted sense but should be read broadly so as to cover or extend to all cognate, subsidiary, ancillary or incidental matters, which can fairly and reasonably be said to be comprehended in it; (e) since the specific entries in the three Lists between them exhaust all conceivable subjects of legislation, every matter dealt with by an enactment should as far as possible be allocated to one or the other of the Entries in the Lists and the residuary Entry 97 in List I should be resorted to as the last refuge; and (f) if entries either from different Lists or from the same List overlap or appear to conflict with each other, every effort is to be made to reconcile and bring out harmony between them by recourse to known methods of reconciliation.

It is also well settled that the phrase 'with respect to' appearing in art. 74(1) and (2) of the Federal Constitution – the provision conferring legislative power upon the Federal and State Governments respectively – is an expression of wide import. As observed by Latham CJ in *Bank of New South Wales v. The Commonwealth* [1948] 76 CLR 1 at p 186, in relation to the identical phrase appearing in s. 51 of the Australian Constitution which confers Federal legislative authority:

> A power to make laws 'with respect to' a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power. The power conferred upon a Parliament by such words in an Imperial statute is plenary – as wide as that of the Imperial Parliament itself: *R v. Burah* (1878) 3 App Cas 889; *Hodge v. R* (1883) 9 App Cas 117. But the power is plenary only with respect to the specified subject.

A Although Latham CJ was dissenting on that occasion, we are unable to see any criticism in the majority judgments in relation to what was said in the foregoing passage. Indeed, a reading of all the judgments in that case reveals that there was no disagreement between their Honours upon the applicable interpretative principles. Where the majority parted company with the learned Chief Justice was only with regard to the consequence that resulted on an application of those principles to the particular statute that was the subject of challenge.

[21] In *United Provinces v. Mt. Atiqa Begum and Other* AIR 1941 C Federal Court 16, Gwyer CJ held as follows:

I think however that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.

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[22] In *Harakchand Ratanchand Banthia v. Union of India* AIR 1970 Supreme Court 1453, Ramaswami J stated as follows:

Before construing these entries it is useful to notice some of the well settled rules of interpretation laid down by the Federal Court E and by this Court in the matter of construing the entries. The power to legislate is given to the appropriate legislatures by Article 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate. It is well F established that the widest amplitude should be given to the language of the entries. But some of the entries in the different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about a harmonious construction.

G **[23]** (See also generally the following cases of *Subramaniam v. Muthuswami* AIR 1941 FC 47, *Punjab D. Industries v. I.T. Commr* AIR (52) 1965 Supreme Court 1862, *Diamond Sugar Mills v. State of U.P.* AIR (48) 1961 Supreme Court 652, *In re C.P. Motor Spirit Act* AIR 1939 Federal Court 1, *Union of India v. Shri Harbhajan* H *Singh Dhillon* [1971] 2 SCC 779 and *Dorairajan v. State of Madras (FB)* AIR (38) 1951 Madras 120 [C.N. 14]).

[24] Section 53 of the Enactment is enacted pursuant to Item 1, State List, Ninth Schedule of the Federal Constitution which I confers upon the State Legislature the power to enact laws relating to the religion of Islam generally. One of the entries in

Item 1 is the creation of offences by persons professing the religion of Islam against the precepts of that religion. Section 53 of the Enactment makes it an offence for any person to engage in the teaching of Islam to any person, other than to members of his family, without first obtaining a *tauliah*. The purpose of this provision is clear, that is to protect the integrity of the *aqidah* (belief), *syariah* (law) and *akhlak* (morality) which constitutes the precepts of Islam. The requirement is necessary to ensure that only a person who is qualified to teach the religion is allowed to do so. This is a measure to stop the spread of deviant teachings among Muslims which is an offence under s. 52 of the Enactment. It is commonly accepted that deviant teachings is an offence against the precepts of Islam. Therefore, the respondents contend that, by necessary implication, the teaching of Islam without a *tauliah* could similarly be construed as an offence against the precepts of Islam. In our judgment, there is merit in the respondents' contention. For those reasons, we hold that the State Legislative Assembly of Negeri Sembilan had acted within its legislative power in enacting s. 53 of the Enactment.

[25] The respondents further contend that s. 53 of the Enactment is an order or direction made by *Ulil Amri* (Arabic term referring to the Government) and for so long as the order or direction is not contrary to Al-Quran or As-Sunnah and is not an order or direction to engage in *maksiat* (vice), it is obligatory upon Muslims to abide by such order or direction. Obedience to such order or direction constitutes a precept of Islam. In this regard, we are in complete agreement with the view of the Mufti of Negeri Sembilan as stated in his affidavit filed herein which reads:

> Di dalam pentadbiran negara setiap keputusan dan tindakan hendaklah sentiasa mengambil kira prinsip yang digariskan oleh kaedah *Fiqh* iaitu –
>
> تصـــرف الـراعي بالرعيـــة منوط بالمصـــلحة
>
> Maksudnya : Urusan Pemerintah terhadap rakyat terikat dengan Maslahah.
>
> Kaedah ini memberi garis panduan kepada pemerintah dalam urusan pentadbiran negara membuat peraturan atau polisi yang mengutamakan kemaslahatan masyarakat.

> Maslahah merupakan salah satu prinsip *Usul Feqh*. Maslahah pada asalnya ialah apa yang memberi manfaat dan menjauhkan kemudaratan. Namun yang dimaksudkan dengan maslahah ialah memelihara *maqasid syariyyah* yang lima, iaitu menjaga agama, jiwa, akal, keturunan dan harta. Setiap perkara yang membawa kepada lima perkara asas ini dianggap maslahah. Manakala setiap perkara yang menggugat lima perkara ini dianggap *mafsadah* (kerosakan) dan menjauhkannya adalah maslahah. (al-Ghazaliyy 1997: 216-217 al-Mustasfa Min 'Ilm al-Usul).

[26] In our judgment, the requirement of *tauliah* for the purpose of protecting the public interest *(maslahah)* falls within the concept of *Siyasah Syari'yyah*. Such order and direction are made not merely to prevent deviant teachings, but also to maintain order and prevent any division in the community. Clearly, no one could suggest that the requirement of a *tauliah* as stipulated in s. 53 of the Enactment is a *maksiat*. On the contrary, we are of the view that it is necessary in this day and age for the authority to regulate the teachings or preaching of the religion in order to control, if not eliminate, deviant teachings. The integrity of the religion needs to be safeguarded at all cost. That is what s. 53 of the Enactment purports to do.

[27] The petitioners also seek a declaration that the Syariah Court for Negeri Sembilan does not have jurisdiction to try an offence under s. 53 of the Enactment on the ground that the provision does not fall within Item 1, State List, Ninth Schedule of the Federal Constitution. In view of our earlier findings, it necessarily follows that the petitioners' contention herein is devoid of any merit.

[28] For completeness, we wish to add that s. 53(1) of the Enactment was enacted pursuant to the provision of s. 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965, a federal legislation conferring criminal jurisdiction to the Syariah Courts in respect of offences against the precepts of the religion of Islam by persons professing that religion. Therefore, we hold that the Syariah Court of Negeri Sembilan is conferred with the necessary jurisdiction to try such an offence.

Conclusion

[29] For the above reasons, the petition is dismissed. By consent no order is made as to costs.